

## ASSIGNMENT BY CHECK—A COMPARATIVE STUDY

"PAYMENT" in the business world is usually made by check. Relying on his drawer's good faith and the criminal prohibition against drawing a "rubber" check,<sup>1</sup> the holder customarily presents the check to the drawee bank<sup>2</sup> before pressing the drawer for payment on the underlying debt.<sup>3</sup> Since the bank, in the vast majority of cases, makes payment as expected, the holder has come to believe that in taking a check he receives deposit currency;<sup>4</sup> a claim to funds deposited with the drawee bank.<sup>5</sup> His expectations are akin to those of an assignee of a chose-in-action, who becomes the obligee of a debt previously owing to his assignor.<sup>6</sup>

The law, however, does not always coincide with the expectations of businessmen. In the United States the legal status of a checkholder is analogous

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1. Every state has one or more criminal statutes directed against the bad check fraud. These statutes differ materially in form and substance from state to state. In general they provide criminal penalties for "making, drawing, uttering or delivering" a check known to be worthless with intent to defraud. For a compilation of the various state statutes, see 1 PATON, *DIGEST OF LEGAL OPINIONS* 1146-62 (1940). See also the model statute recommended for uniform enactment by the American Bankers Association in *id.* at 1145.

2. Presentment is usually made directly over the counter or through the mails, or indirectly through a clearing house by depositing the check with the holder's own bank. See Note, *Deferred Posting Under the Proposed Commercial Code*, 59 *YALE L.J.* 961-3 (1950), and sources cited therein.

3. This practice has been crystallized in the law. See *Cruger v. Armstrong and Barnwall*, 3 Johns. Cas. 5 (N.Y., 1802).

4. See SMITH & MOORE, *CASES ON BILLS AND NOTES* n.1 (4th ed. 1941); Feezer, *Death of the Drawer of a Check*, 14 *MINN. L. REV.* 124 (1929).

5. The payee is aware, of course, that actual payment will be delayed until the bank has examined the drawer's account to make sure there are sufficient funds on hand to cover the check. Barring insufficient funds, however, he regards his claim against the bank as immediate, subject to no risks during the waiting period. For a detailed account of the risks he actually runs during the period and the legal rules which have set limits to the waiting period, see pp. 1020-1 and 1010-20 *infra*.

6. The early common law did not permit assignment of a chose in action. Assignability was first recognized by the English courts of equity in the fifteenth century. For a complete survey of the development of assignability of choses in action at law, see Cook, *The Alienability of Choses in Action at Law*, 29 *HARV. L. REV.* 818 (1916). Drawing checks on funds deposited with a bank is analogous factually (though not legally) to the assignment of a claim in parcels. And while such an assignment is still not permitted at law on the ground that subjection of a debtor to multiple claims where only one was originally contemplated would be too oppressive, a debtor may previously agree to assignment of his debt in parts. *McFadden v. Wilson*, 96 Ind. 253 (1884); see also 2 MORSE, *BANKS AND BANKING* 1127 n.2 (6th ed. 1928). If the NIL were amended to permit a check to operate as an assignment, as suggested *infra*, there could be no objection on the ground of multiple claims because the agreement between a bank and its depositor contemplates withdrawal of the deposited funds in parcels.

to that of a creditor.<sup>7</sup> Section 189 of the Negotiable Instruments Law<sup>8</sup> provides that a check of itself, unless accepted by the drawee bank, gives the holder no claim against the drawer's bank account. And to demolish the theory which would give the holder such a claim, it specifically provides that a check, in the absence of parol evidence to the contrary, does not operate as an assignment of funds on deposit with the drawee bank.<sup>9</sup>

The check, under American law, is regarded as a mere order to the drawee bank to pay. Under agency principles the bank's authority may be revoked before acceptance or payment.<sup>10</sup> And the checkholder's expectation of payment may be defeated by the drawer's prior insolvency,<sup>11</sup> or by prior garnishment of the drawer's account.<sup>12</sup> Although the holder's rights on the underlying obligation remain unaffected, before payment he runs all the risks of a creditor.<sup>13</sup>

In France, by contrast, a theory more consonant with business expectations has been developed under the doctrine of *provision*.<sup>14</sup> "Payment" by check in France transfers the *provision*, or claim of the drawer against the drawee, just as an assignment would do under American law.<sup>15</sup> Even without notice to the

7. See *Bank of the Republic v. Millard*, 10 Wall. 152 (U.S. 1869); *Chapman v. White*, 6 N.Y. 412 (1852).

8. First proposed to the state legislatures in 1896, the Negotiable Instruments Law is now in force in every state. The last state to adopt the law was Georgia, in 1924.

9. Prior to the Negotiable Instruments Law there was a split of authority in the United States as to whether a check operated as an assignment. The majority position was that it did not. *Bank of Republic v. Millard*, 10 Wall. 152 (U.S. 1869); *Chapman v. White*, 6 N.Y. 412 (1852). But minority jurisdictions, principally in the Midwest and South, took the opposite view. *E.g.*, *Munn v. Burch*, 25 Ill. 35 (1860), and cases collected in Note, 5 A.L.R. 1667 (1920).

Although this conflict was presumably resolved by adoption of Section 189 of the NIL, the minority rule was hard dying. Some of the old minority jurisdictions still applied their pre-statutory assignment rule in controversies between the holder of a check and the drawer or third parties claiming through him, where the bank's interests were not directly involved. *McLain v. Torkelson*, 187 Iowa 202, 174 N.W. 42 (1919); *Elgin v. Gross-Kelly & Co.*, 20 N.M. 450, 150 Pac. 922 (1915); *Pease v. Landauer*, 63 Wis. 20, 22 N.W. 847 (1885). Today this view has been abandoned on the theory that Section 189 was intended to establish the majority rule as a uniform one in all jurisdictions. *Leach v. Mechanics' Savings Bank*, 202 Iowa 899, 211 N.W. 506 (1926); *In re Thornton's Guardianship*, 243 Wis. 397, 10 N.W.2d 193 (1943). In spite of this development, however, courts in former minority jurisdictions remained ready to protect checkholders by finding parol evidence of an intent to create an equitable assignment. For a discussion of equitable assignments and other doctrines invoked by these courts for the benefit of holders, see pp. 1020-1 *infra*.

10. See notes 40, 42, and 64 *infra*.

11. See note 23 *infra*.

12. See note 36 *infra*.

13. See *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 370, 248 Pac. 947, 950 (1926).

14. The word has the same root as the English "provision" (Latin, *pro* + *videre*, to foresee). Its meaning is roughly equivalent legally to "deposit."

15. The French Uniform Check Law provides that negotiation of a check transfers "ownership" in the *provision*. Law of October 30, 1935, [1935] DÉCRET UNIFIANT LE DROIT

drawee bank this transfer is effective as against the drawer and against those claiming through him.<sup>16</sup> The drawer relinquishes control over the funds represented by the check, and circumstances apart from the underlying transaction cannot affect the holder's right to receive payment from those funds.

Yet the check under the doctrine of *provision* is something more than an assignment. It is a negotiable instrument as well. The holder in due course takes clear of any defenses which could be raised against prior parties.<sup>17</sup> He retains a right of action against the drawer and prior indorsers when for any reason the check is dishonored by the drawee bank.<sup>18</sup> Thus the drawer bears the risk of the bank's insolvency during the interim between delivery of the check and timely presentment for payment.<sup>19</sup>

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EN MATIÈRE DE CHÈQUES art. 17, [1935] Dalloz Périodique IV.467 [hereafter cited as French Uniform Check Law]. And the highest court in France has held that the underlying theory of the doctrine of *provision* is essentially that of assignment of a chose-in-action. See BOUTERON, LA JURISPRUDENCE DU CHÈQUE 5 (1937). For various other theories regarding the nature of the interest transferred, see BOUTERON, LE CHÈQUE 138 *et seq.* (1924). None of these is of practical importance today since almost all the holder's rights are now specifically described by statute.

16. The best general discussions of the effects of the *provision* doctrine as applied to checks are BOUTERON, LE CHÈQUE 324 *et seq.* (1929); 2 ESCARRA, MANUEL DE DROIT COMMERCIAL 746 (1948). See also 4 LYON-CAEN & RENAUT, TRAITÉ DE DROIT COMMERCIAL 524-5 (5th ed. 1925) (bankruptcy of drawer); Société Générale v. Piednoire, Cour de Cassation, June 18, 1946, [1946] SIREY, RECUEIL DES LOIS ET JURISPRUDENCE [hereafter cited as RECUEIL SIREY] I.100 (stop order). For the position that in the case of checks, unlike bills of exchange, the *provision* doctrine does not protect a holder against a trustee in bankruptcy or a garnishing creditor of the drawer, see VALÉRY, DES CHÈQUES EN DROIT FRANÇAIS 87-90 (1936). Baléry admits, however, that the French case law is against him.

For discussions of the *provision* doctrine as applied to bills of exchange, see HIRSCH, DER RECHTSBEGRIFF PROVISION IM FRANZÖSISCHEN UND INTERNATIONALEN WECHSELRECHT 50 *et seq.* (1930); Wahl, Die Französische Wechselprovisionslehre, 4 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES RECHT 405 (1930).

In this Comment the phrase "persons claiming through the drawer" is used to describe three categories of persons: the drawer's trustee in bankruptcy, (or any other administrator of an insolvent drawer's estate); a garnishing creditor of the drawer; and the administrator or executor of a decedent drawer's estate.

Apparently the *provision* doctrine does not protect the holder of an outstanding check against the holder of a subsequently drawn but previously cashed check. VALÉRY, *supra*, at 92-3. See also BOUTERON, LE CHÈQUE 285 n.3 (1924).

17. French Uniform Check Law, arts. 21, 19; VALÉRY, DES CHÈQUES EN DROIT FRANÇAIS 86, 97. Compare with NEGOTIABLE INSTRUMENTS LAW § 57.

18. French Uniform Check Law, arts. 19, 40; Cour de Cassation, Nov. 30, 1938, [1940] RECUEIL SIREY I.48; see also Pianetti v. Mutuelle du Turf, Dijon, Apr. 14, 1943, [1944] RECUEIL SIREY II.60. Compare with NEGOTIABLE INSTRUMENTS LAW § 57.

19. In the event of the drawee's insolvency prior to payment, the holder may elect to recover from the drawer the entire amount of the check or to become a claimant in the insolvent bank's estate. If he chooses the second alternative, he retains a right of recourse against the drawer for the difference between the face amount of the check and the amount paid him in the administration of the insolvent's estate. VALÉRY, DES CHÈQUES EN DROIT FRANÇAIS 86 (1936). Compare with NEGOTIABLE INSTRUMENTS LAW § 61.

The difference between the American and French theories has been described as one between a "banking" and a "mercantile" theory.<sup>20</sup> Impetus in the United States for support of a non-assignment rule has apparently stemmed from a desire to protect banking interests. Indeed, American courts justify the non-assignment rule on the ground that it conforms most favorably with sound banking practice.<sup>21</sup> In France, on the other hand, banking interests play a less dominant role in the community. Development of the doctrine of *provision* stemmed from a strong desire to protect the merchant or farmer who gave value in exchange for a check.<sup>22</sup>

The French doctrine has achieved its goal of benefitting merchants and farmers. At the same time, it appears to have had no ill effect on the French banking business. The American non-assignment rule, on the other hand, while of questionable utility as a protector of banking interests, has caused hardship to checkholders. It has served to defeat checkholders' expectations in a variety of situations where the bank is a mere bystander.

#### INCIDENTS OF NON-ASSIGNMENT

##### *Insolvency*

One of the most frequent hardships imposed on a checkholder in America ensues upon insolvency of the drawer. Absent an expression of intent to create an assignment to the payee, the trustee of a bankrupt drawer is entitled to the balance in the drawer's account in preference to the holder of an outstanding unaccepted check drawn and delivered for value before bankruptcy.<sup>23</sup> The holder's only recourse is against the drawer's estate as a general rather than a preferred creditor. In France, where the check from the time of its delivery transfers the "ownership" of the *provision* to the payee, the drawer's insolvency can have no effect on the holder's right to receive payment from the *provision* funds.<sup>24</sup>

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20. See Mitchell, *The British Conception of Negotiable Instruments v. the French*, 10 J. COMP. LEG. & INT'L L. (N.S.) 237, 240 (1928).

21. See *Kaesemeyer v. Smith*, 22 Idaho 1, 13, 123 Pac. 943 (1912); *Imboden v. Perrie*, 81 Tenn. 504, 506 (1884); *Attorney General v. Continental Life Insurance Co.*, 71 N.Y. 325, 331, 27 Am. Rep. 55 (1877).

It has been suggested, however, that the non-assignment rule was originally applied to checks not because of practical considerations but because the question first arose when the assignment of choses in action was not recognized at law. See Feezer, *Death of the Drawer of a Check*, 14 MINN. L. REV. 124, 128 (1929).

22. See Mitchell, *supra* note 20, at 243. The same difference in emphasis explains the split of authority which existed in the United States prior to the adoption of the Negotiable Instruments Law. See note 9 *supra*. In states adopting the minority rule banking interests played a secondary role. Cf. Note, 46 YALE L.J. 483, 492 (1936).

23. *E.g.*, *Bowker v. Haight*, 146 Fed. 257 (C.C.S.D.N.Y. 1906). The same applies to any administrator of an insolvent drawer's estate. *Leach v. Mechanics' Savings Bank*, 202 Iowa 899, 211 N.W. 506 (1926); *People v. Union State Bank of Lancaster*, 192 Wis. 28, 211 N.W. 931 (1927).

24. BOUTERON, *LA JURISPRUDENCE DU CHÈQUE* 181 *et seq.* (1937); 2 ESCARRA, *MANUEL DE DROIT COMMERCIAL* 746 (1948); 4 LYON-CAEN & RENAULT, *TRAITÉ DE*

The American result has been justified primarily on the ground that this is a case where "equality among creditors is equity." The payee and all other creditors relied on the credit of the drawer; all are equally innocent and should therefore be given equal treatment.<sup>25</sup> A second possible justification is that non-assignment is a convenient rule of thumb for striking down transfers to checkholders which might defraud or discriminate unfairly against the insolvent drawer's general creditors.

Neither justification is sound. The first assumes that the checkholder is a creditor—a status with which he is saddled as a consequence of the non-assignment rule, the very merits of which are in question. Actually, the payee who takes a check for value is not in truth a creditor. He "collected" his claim in what commonly passes as cash, *i.e.*, deposit currency,<sup>26</sup> and should be preferred over creditors who elected to trust their debtor instead. Under a broader view than the equities between the parties, moreover, security in commercial transactions calls for protection against the drawer's insolvency of a checkholder who gave full, present value. Such a result has the additional attribute of encouraging the use and negotiability of checks.

The argument that the non-assignment rule protects the insolvent drawer's general creditors against fraud or unfair discrimination ignores the existence of other sources of protection. Where the drawer is in bankruptcy the trustee may set aside fraudulent conveyances by the drawer perfected less than a year,<sup>27</sup> and preferential payments on antecedent debts perfected less than four months, before bankruptcy.<sup>28</sup> Where the insolvent drawer is not yet in bankruptcy, fraudulent conveyances made within the period of the state statute of

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DROIT COMMERCIAL 524-5 (5th ed. 1925); WAHL, PRÉCIS DE DROIT COMMERCIAL 701 (1922). [For a contrary view, see VALÉRY, DES CHÈQUES EN DROIT FRANÇAIS 88-90 (1936).] The French bankruptcy law, however, provides certain exceptions to the general rule. See CODE DE COMMERCE arts. 446-447 (1948). Bouteron, in summarizing the impact of Articles 446 and 447, states that the delivery of a check is ineffective as against the trustee in bankruptcy of the drawer if the check is given as a gift or for a debt not yet due. In both situations the court before which a petition to nullify the transfer is pending must declare the transfer void as a matter of law. If, on the other hand, the check is given in payment of a debt due, three conditions must be met before the transfer can be set aside: (a) the transfer took place after "la cessation des paiements" on the part of the drawer [the French equivalent of equity insolvency]; (b) the holder knew when he took the check that payments had been stopped; and (c) the court regards it as desirable that the transfer should be set aside. BOUTERON, LE DROIT NOUVEAU DU CHÈQUE 34 (1928). Thus the French law usually permits the holder of an outstanding check to prevail over the drawer's trustee in bankruptcy, and any exceptions to this rule are governed by the bankruptcy law, not by the Uniform Check Law.

25. For criticism of this justification of the American rule, see 2 MORSE, BANKS AND BANKING 1125-6 (6th ed. 1928). Cf. Zane, *Death of the Drawer of a Check*, 17 HARV. L. REV. 104, 118 (1903).

26. See note 4 *supra*.

27. BANKRUPTCY ACT § 67d. Under § 70e, moreover, the trustee may set aside any fraudulent conveyance which a creditor having a provable claim at the time of bankruptcy could have set aside under state law.

28. BANKRUPTCY ACT § 60.

limitations may be set aside under state law by any creditor.<sup>29</sup> And although, with rare exceptions,<sup>30</sup> transfers are not voidable as preferences under state law, preferential transfers constitute acts of bankruptcy if made while the debtor was insolvent.<sup>31</sup> Thus where an insolvent drawer makes a preferential transfer by check, he can be thrown into bankruptcy and the transfer set aside by the trustee. Most check transactions, moreover, neither defraud nor discriminate against the drawer's general creditors. Employment of the non-assignment rule to knock out all outstanding checks is not only superfluous; it strikes down many transactions which are fair and legitimate under accepted doctrines of creditor protection. Bankruptcy rules and state law on fraudulent transfers, rather than the non-assignment doctrine, should govern in the administration of insolvent drawers' estates.<sup>32</sup>

The desirability of establishing a sound check collection system has bred a recent trend away from non-assignment as applied to the drawer's insolvency in the area of interbank transfers.<sup>33</sup> When a checkholder deposits a check for collection, the depository bank forwards the item to the drawee. The proceeds are remitted by the drawee bank to the depository, usually through one or more intermediary banks, via an interbank settlement order. Where the settlement order is in the form of a draft drawn on a third bank, courts protect the payee of the draft, *i.e.*, the collecting bank, and ultimately the depositing checkholder, against insolvency of the drawer bank before final payment.<sup>34</sup> The American Law Institute, in the Spring 1950 Draft of the proposed Uniform Commercial Code, followed suit by adopting the assignment theory in this particular in-

29. This may be done under the Uniform Fraudulent Conveyance Act, adopted by twenty states since its promulgation in 1919, 9A UNIFORM LAWS ANN. 45-147 (1951), or under the Statute of 13 ELIZABETH, c. 5 (1571), adopted by statute or as part of the common law in all other states. See, *e.g.*, *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109 (1892).

30. *E.g.*, 7 MASS. ANN. LAWS c. 216 § 110 (1933); WASH. REV. STAT. § 5831-2 (Remington 1932).

31. BANKRUPTCY ACT § 3 a(2).

32. For the comparable French solution, see note 24 *supra*.

33. See Turner, *Equitable Assignment of Bank Deposits*, 37 YALE L.J. 626, 632-3 (1928).

34. *Kesl v. Hanover State Bank*, 109 Kan. 776, 204 Pac. 994 (1921); *Central Trust Co. v. Bank of Mullens*, 108 W.Va. 12, 150 S.E. 137 (1929); *Federal Reserve Bank v. Peters*, 139 Va. 45, 123 S.E. 379 (1924). *Contra*: *Central Farmer's Trust Co. v. Fort Lauderdale Bank*, 114 Fla. 84, 153 So. 93 (1934). For an extensive collection of authorities on both sides of the question, see Bogert, *Failed Banks, Collection Items, and Trust Preferences*, 29 MICH. L. REV. 545, 546-52 (1931).

The issue usually arises in a suit brought by A or by Bank X against the receiver of the insolvent Bank Y (to whom Y's funds in Bank Z have been turned over), seeking a preference in the distribution of Y's assets. Most courts which allow such a preference speak of Y bank as holding the funds "in trust" for the depository bank X, or the depositing checkholder A. Section 13(2) of the Bank Collection Code does the same.

See, generally, 3 SCOTT, TRUSTS §§ 534-6 (1939); Bogert, *supra*; Steffen, *The Check Collection Muddle*, 10 TULANE L. REV. 537 (1936); Comment, 36 YALE L.J. 682 (1927).

stance. This draft provided that an interbank settlement order continued unrevoked and unimpaired by any suspension of payments by the issuing bank.<sup>35</sup>

The inequity of restricting the assignment rule to insolvency of bank issuing interbank settlement orders is clear from the following illustration: Check-holders A and B deposit with Bank X checks drawn on Bank Y. A's check is forwarded to Bank Y, and is honored by an interbank settlement order drawn by Bank Y on Bank Z. Before final payment by Bank Z, Bank Y fails. A is protected under the exception to non-assignment by a direct claim against Bank Y's account in Bank Z or by sharing as a preferred creditor in the assets of Bank Y.

B's check is forwarded to Bank Y. Bank Y remains solvent, but dishonors the check because the drawer is insolvent. Under the non-assignment rule, B has no claim against his drawer's account in Bank Y. He shares in B's estate as a general creditor.

The fates of A and B, whose equities are the same, are thus made to depend on which drawer fails. Such inequality can be avoided only by abolishing the non-assignment rule as applied to a drawer's intervening insolvency.

#### *Garnishment of the Drawer's Account*

Similar to the problem raised by the drawer's insolvency is the one presented by creditors who garnish the drawer's account. Should they be preferred over the holder of an outstanding check? Again, the answer has been made to depend on whether or not a check is an assignment. In the United States a check, of itself, does not defeat a garnishment levied on the drawer's account

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35. A.L.I. UNIFORM COMMERCIAL CODE § 4-501(3) (Spring 1950 Draft). The comment to this section states that the objective is "to make the remittance draft between banks effective as if an assignment, or to adopt in part the Civil Law concept of 'provision,' that is, title to the deposit credit passes to the holder of an item when the item is issued, subject to the interbank settlement order being presented against an account with a sufficient credit balance."

The Spring 1950 Draft of the Code further provides that if a drawee bank which has received an item suspends payment before settling for the item or sends an interbank settlement order which is not collectible, the customer of the depository bank "may recover as if a depositor in the payor [drawee] bank." *Id.* § 4-501(1). Thus if drawee bank were an insured bank, the holder would be protected by Federal Deposit Insurance to the extent of \$10,000. See note 52 *infra*; 12 CODE FED. REGS. § 330.2 (Supp. 1950). Furthermore, under the Code the holder, instead of collecting on the interbank settlement order or recovering as a general depositor of the drawee bank, can elect to treat the item as unpaid and hold secondary parties. A.L.I. UNIFORM COMMERCIAL CODE § 4-501(4) (Spring 1950 Draft).

For the comparable provision of the Spring 1951 Draft, see A.L.I. UNIFORM COMMERCIAL CODE § 4-212 (Spring 1951 Draft). At its May 1951 meeting the American Law Institute voted to delete as an article from the Code Article 4 (Bank Deposits and Collections). However, the Institute also voted at that time to retain in Article 3 (Commercial Paper) a number of the sections formerly in article 4. The proposed final draft No. 2 of the Code is being revised accordingly. Communication to the YALE LAW JOURNAL from Paul A. Wolkin, Assistant to the Director, American Law Institute, dated June 18, 1951, in Yale Law Library.

before payment.<sup>36</sup> Under the French assignment rule the opposite result is reached.<sup>37</sup>

Here, as in the case of the drawer's bankruptcy, the assignment rule better honors the holder's expectations and fosters the use and negotiability of checks. In the garnishment situation, moreover, it cannot even be claimed that the non-assignment rule is a device for fostering equality. On the contrary, it permits the garnishee to cut off completely the holder who received his check for value prior to the garnishment. And recourse against the drawer whose account was garnished will probably prove difficult if not futile.

It may be argued, however, that non-assignment protects the drawer's creditors against fraudulent or preferential transfers by check immediately prior to garnishment. But here again other remedies are available. Under the doctrine of fraudulent conveyances a creditor can set aside any transfer by his debtor in fraud of his claim.<sup>38</sup> And under the Bankruptcy Act he can throw an insolvent debtor into bankruptcy for making a preferential transfer and have the trustee set aside the transfer for the benefit of all creditors.<sup>39</sup> Prevention of fraud or unfair preferences can be achieved without adopting the non-assignment rule—a rule which blankets all checkholders, the legitimate and the unpreferred as well as the fraudulent and the preferred.

### *Death of the Drawer*

In the United States a bank may not pay a check after receiving notice of the drawer's death.<sup>40</sup> This result is not a necessary corollary of the non-assignment rule.<sup>41</sup> But since a check is not an assignment, it is construed

36. *Kaesemeyer v. Smith*, 22 Idaho 1, 123 Pac. 943 (1912); *Wileman v. King*, 120 Miss. 392, 82 So. 265 (1919). See also *Notes*, 50 A.L.R. 403 (1927); 84 A.L.R. 412 (1933).

37. *BOUTERON, LE CHÈQUE* 324 (1924); *BOUTERON, LE DROIT NOUVEAU DU CHÈQUE* 38 *et seq.* (1928); *WAHL, PRÉCIS DE DROIT COMMERCIAL* 702 (1922). For a contrary view, see *VALÉRY, DES CHÈQUES EN DROIT FRANÇAIS* 87-8 (1936).

38. See note 29 *supra*.

39. See notes 28 and 30 *supra*.

40. A bank's authority to pay a check is revoked by the death of the drawer; the administrator of the drawer's estate is entitled to the funds deposited in the drawer's account at the time of his death. *Dixon Shoe Co. v. Moen*, 208 Wis. 389, 243 N.W. 327 (1932); *Bridewell v. Clay*, 185 S.W.2d 170 (Tex. Civ. App. 1944). And a bank paying a check after notice of death is liable to the drawer's estate. *Sneider v. Bank of Italy*, 184 Cal. 595, 194 Pac. 1021 (1920). Where the bank pays after death but before notice, the payment is valid. *Glennan v. Rochester Trust & Safe Deposit Co.*, 209 N.Y. 12, 102 N.E. 537 (1913).

A few courts have held, contrary to the general rule, that the drawer's death does not revoke the bank's authority to pay. *May v. Jones*, 87 Iowa 188, 54 N.W. 231 (1893).

41. The original draft of the Negotiable Instruments Law contained an additional section numbered 190, which read as follows: "The death of the drawer does not operate as a revocation of the authority of the bank to pay a check, if the check is presented for payment within 10 days from the date thereof." See, *e.g.*, the original draft of the N.I.L. as reported to the New Jersey legislature in January 1896. New Jersey, 52d Senate,



to create a mere agency ordering the bank to make payment. And since an agency is usually revoked by the principal's death, the grantor's death is deemed to revoke the bank's agency under the check.<sup>42</sup> In France, by contrast, the death of the drawer does not affect the checkholder's right to receive payment.<sup>43</sup>

The American rule has been justified by pointing to the holder's right to recover from the drawer's estate.<sup>44</sup> But the drawer may have died insolvent, and the checkholder may get less than the face amount of the check. And if the drawer died solvent, the tradesman who took a check as "payment" for something of value would be compelled to submit to delay, expense, and inconvenience as a claimant in the administration of the drawer's estate.

There may be cases, however, where a check has been given to the payee for nothing. It might be argued that adoption of the French rule in such instances would thwart the objectives of the Statute of Wills, by permitting a man in his last illness to sign a check disposing of his entire estate without benefit of the protective formalities required of a testamentary transfer.<sup>45</sup> But no less formality is involved in signing and delivering a check than in writing and delivering an unsealed instrument of gift—and some courts have held that delivery of the latter is sufficient to make a valid gift *causa mortis*.<sup>46</sup>

SENATE JOURNAL 134 at 176 (1896). For a list of the few states which have enacted statutory provisions similar to the original draft Section 190, see 1 PATON, DIGEST OF LEGAL OPINION 1085-6 (1940). It is doubtful, however, whether these statutes offer the checkholder any additional protection, because under them the administrator can probably recover any payment made after the drawer's death. *Burrows v. Burrows*, 240 Mass. 485, 134 N.E. 271 (1922) (held that a Massachusetts statute permitting the bank to pay a check within ten days of its customer's death, with or without notice, was enacted for the bank's protection and had no bearing on the rights of the holder against the drawer's estate).

1 MORSE, BANKS AND BANKING 891 (6th ed. 1928) contends that revocation of the bank's authority by the drawer's death is a "perversion of reason." And Balkam, *Payment of a Bill of Exchange by the Drawee After the Drawer's Death*, 14 HARV. L. REV. 588, 589 (1901), contends that death of the drawer is not a revocation of the bank's authority to pay, since a countermand of the original order cannot be made without an act of will on the part of the drawer.

42. See *Miller v. Medford National Bank*, 115 Ore. 366, 370-1, 237 P. 361 (1925); *In re Ludlam's Estate*, 158 Misc. 283, 285 N.Y.S. 597, 601 (Surr. Ct. 1936).

43. French Uniform Check Law, art. 33; 2 ESCARRA, MANUEL DE DROIT COMMERCIAL 746 (1948); VALÉRY, DES CHÈQUES EN DROIT FRANÇAIS 84-5, 93-4 (1936).

44. See Zane, *Death of the Drawer of a Check*, 17 HARV. L. REV. 104, 118 (1903).

45. Cf. *Re Hughes*, [1888] 59 L.T. (o.s.) 586 (C.A.); Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 568, 574 (1927). Indeed, the rule that the drawer's death revokes the bank's agency originated in a gift check case. *Tate v. Hilbert*, 2 Ves. Jr. 111, 118 (1793); see *Feezer, Death of a Drawer of a Check*, 14 MINN. L. REV. 124, 128 (1929).

46. *Goldsworthy v. Johnson*, 45 Nev. 355, 204 Pac. 505 (1922) (liberty bonds in possession of bank); *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178 (1875) (promissory notes). For cases upholding the validity of a gift *causa mortis* by the delivery of a sealed

Furthermore, if there is any special reason for holding a gift-check revocable by the drawer's death, it could be accomplished under an assignment theory by specific legislation without prejudicing the interests of the holder of a check drawn for value.<sup>47</sup>

The new Uniform Commercial Code remedies in part the inequities of revocation by death. It codifies the present rule that the drawer's death does not revoke the drawee's authority to pay until the drawee has knowledge of the death. But it further provides that even with such knowledge a bank may pay checks for ten days after the date of death unless directed to stop payment by some person claiming an interest in the account.<sup>48</sup> The shortcoming of this provision lies in its failure to protect the holder against countermands by parties in interest. Where the drawer dies insolvent his creditors will surely stop payment to bring the proceeds within the drawer's estate.

### *Laches and Intervening Insolvency by the Drawee Bank*

Barring laches for failure to make timely presentment to the drawee or to give proper notice of dishonor to the drawer and prior indorsers, a check-holder in France has alternate remedies upon improper dishonor against the bank and against the drawer and prior indorsers.<sup>49</sup> In America the holder's only recourse upon dishonor is against the drawer and prior indorsers.<sup>50</sup>

In both countries, a holder guilty of laches loses his recourse against prior indorsers.<sup>51</sup> In neither country is the drawer, at least in theory, discharged

instrument, see *Meach v. Meach*, 24 Vt. 591 (1852); *Meyers v. Meyers*, 99 N.J.Eq. 560, 134 Atl. 95 (1926). Many courts, however, hold that a gift *causa mortis* cannot be effected by delivery of an instrument of gift, whether sealed or unsealed. *E.g.*, *McGrath v. Reynolds*, 116 Mass. 566 (1875); *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267 (1898). See, generally, *Mechem*, *supra* note 45, at 573-6, 582-3; 4 CORBIN, CONTRACTS § 921 (1951). See also Note, 63 A.L.R. 537, 552-8 (1929).

47. Paton suggests that there may be valid grounds for distinguishing between gift checks and those drawn for value, although he admits that courts do not seem to have drawn this distinction. See 1 PATON, DIGEST OF LEGAL OPINIONS 1080 (1940).

In contrast with the rule as to checks, the death of the drawer of a bill of exchange does not resolve the drawee's authority to pay. See *Feezer*, *supra* note 45, at 138. But bills are less likely to be drawn gratuitously than checks.

48. A. L. I. UNIFORM COMMERCIAL CODE § 4-505 (Spring 1951 Draft).

49. French Uniform Check Law, arts. 17, 40.

50. NEGOTIABLE INSTRUMENTS LAW §§ 61, 66.

51. NEGOTIABLE INSTRUMENTS LAW §§ 70, 71; French Uniform Check Law, art. 40. But see Article 52 of the French Uniform Check Law, which provides that a holder guilty of laches has a claim against prior parties other than the drawer to the extent of their unjust enrichment. For discussion of Articles 40 and 52, see VALÉRY, DES CHÈQUES EN DROIT FRANÇAIS 439-40 (1936). As to the holder's rights against the drawer, see note 53 *infra*.

For an extensive comparative study of the rights of a holder guilty of laches against the various obligees on the instrument, see Kessler, Levi, & Ferguson, *Some Aspects of Payment by Negotiable Instrument: A Comparative Study*, 45 YALE L.J. 1373 (1936).

absolutely. In the United States he is discharged on the check and underlying obligation to the extent that he is damaged by the drawee's intervening insolvency.<sup>52</sup> In France, the holder has an action against the drawer if there never was a *provision* or if the account has been withdrawn.<sup>53</sup>

Recourse against the drawer on the American *pro tanto* theory must wait until the bank's insolvency proceedings have been wound up and the drawer paid off: the amount of loss resulting from the holder's failure to withdraw the funds before insolvency cannot be determined until then.<sup>54</sup> In France, where the holder retains a direct claim against the bank, he can participate in the insolvency proceedings as a general creditor against what is left in the depositor's account.<sup>55</sup> Circuity of action is avoided and the holder is sure of recovering the full amount of the check less whatever was lost through his own negligence. In the United States the holder, with no claim against the bank, must proceed against the drawer for *pro tanto* recovery. Not only is he delayed thereby, but because of the difficulty of assessing damages, he may be

52. Section 186 of the Negotiable Instruments Law provides that "[a] check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." The rule has often been stated as if the only injury chargeable to the holder is that which would result from the drawee's insolvency. See *Andrus v. Bradley*, 102 Fed. 54, 55-6 (C.C.E.D.Pa. 1900); *Flemming v. Denny*, 2 Phila. 111, 112 (D. Ct. Phila. 1856). There is, however, authority to the contrary. See Notes, 53 L.R.A. 432 (1902); 38 L.R.A. (N.S.) 255 (1912). Furthermore, while Section 186 refers only to failure to make presentment, in practice it has also been applied to failure to give notice of dishonor. *Deal v. Atlantic Coast Line R.R.*, 225 Ala. 533, 144 So. 81 (1932). And an injured debtor-drawer is discharged *pro tanto* not only on the instrument but also on the underlying obligation. Kessler, Levi, & Ferguson, *Some Aspects of Payment by Negotiable Instrument: A Comparative Study*, 45 YALE L.J. 1373, 1387 (1936).

The likelihood of damage to the drawer as a result of the intervening insolvency of the drawee bank is lessened by Federal Deposit Insurance, which now protects a depositor of an insured bank to the extent of \$10,000. Pub. L. No. 797, 81st Cong., 2d Sess. § 2 (Sept. 21, 1950).

53. French Uniform Check Law art. 52; 2 ESCARRA, *MANUEL DE DROIT COMMERCIAL* 753 (1948); VALÉRY, *DES CHÈQUES EN DROIT FRANÇAIS* 439-40 (1936).

54. See Comment, 8 N.C.L. REV. 444, 449 (1930).

55. VALÉRY, *DES CHÈQUES EN DROIT FRANÇAIS* 86 (1936). Article 40 of the French Uniform Check Law discharges all obligees on a check upon an undue delay in presentment. This discharge, however, does not operate in favor of the drawee bank, because of the *provision* doctrine. Instead, Article 32, providing that the drawee *may* pay a check even after the expiration of the statutory period prescribed for presentment, has been read as mandatory and not merely permissive. A bank with adequate *provision* must pay an overdue check unless the statutory period of limitations has run. *Société Générale v. Piednoire*, Commerce Tribunal de Bordeaux, March 2, 1944 [1945] RECUEIL SIREY II. 12.

denied recovery completely.<sup>56</sup> The net effect may be enrichment of the drawer at the expense of the checkholder.<sup>57</sup>

The Uniform Commercial Code, in this particular instance, reaches a result which would ensue under an assignment theory. Under the Code, when the drawee fails after the holder has been guilty of laches, the drawer is discharged only if he makes a written assignment to the amount of the check of his claim against the drawee.<sup>58</sup> Although the fiction of non-assignment is preserved by the Code, the choice for the drawer is hardly voluntary.<sup>59</sup> In effect, an assignment accrues to the benefit of the checkholder despite the absence of any showing that the parties so intended.

Blanket adoption of an assignment rule would not place on the checkholder the risk of the bank's insolvency before timely presentment can be made.<sup>60</sup> It might be argued that under traditional assignment law the checkholder would bear the risk of the bank's insolvency where his drawer had no reason to know of it at the time he delivered the check.<sup>61</sup> Here again, however, the French experience is helpful. In France, the check retains all the characteristics of a negotiable instrument, one of which is that the drawer bears the risk of the

56. See, e.g., *Commercial Investment Co. v. Lundgren-Wittensten Co.*, 173 Minn. 83, 216 N.W. 531 (1927); *Kling Bros. v. Whipps*, 132 Okla. 253, 270 Pac. 79 (1928). See also Kessler, Levi, & Ferguson, *supra* note 51, at 1387: "In any event it is almost correct to say, for practical purposes, that total discharge follows any injury to the drawer of a check." Compare A.L.I. UNIFORM COMMERCIAL CODE (Spring 1950 Draft), comment to § 3-502: "The decisions have turned upon burden of proof, and the drawer has seldom succeeded in proving his discharge."

57. Out-of-court assignments of the drawer's rights against the bank, however, have sometimes protected the holder. See *Gregg v. George*, 16 Kan. 546 (1876). But such assignments are not mandatory. And in states where the holder has the burden of showing the absence of injury, the drawer has little reason for making an out-of-court assignment. See Kessler, Levi, & Ferguson, *supra* note 51 at 1387-8.

"In the application of the so-called *pro tanto* rule, considerable difference has arisen as to the burden of proof. The majority rule seems to be that the drawer will have the burden of showing that he has been injured. [Citing cases] . . . In some of the states applying the majority rule, the burden is satisfied if the drawer shows that the drawee bank is insolvent, and it remains for the holder to show that there is no causal relation between his laches and the damage caused by the insolvency. [Citing cases.]" *Id.* at 1388 n. 63.

58. A.L.I. UNIFORM COMMERCIAL CODE § 3-502(1) (b). (Spring 1951 Draft).

59. In this respect the approach of the English Bills of Exchange Act is more realistic. A drawer who is damaged by an unreasonable delay in presentment is discharged to the full amount of the check, but the holder gains an assignment of the drawer's claim against the bank by operation of law without any act on the part of the drawer. 45 & 46 VICT. c.61 § 74 (1882). See CHALMERS, *BILLS OF EXCHANGE* 295 (9th ed. 1927).

60. This risk has been reduced considerably today. Federal Deposit Insurance, which now protects the drawer to the extent of \$10,000 against the bank's insolvency before payment or acceptance, see note 52 *supra*, should under an assignment rule protect the holder of an outstanding check.

61. See 4 CORBIN, *CONTRACTS* § 904 (1951).

bank's insolvency between delivery of the check and timely presentment.<sup>62</sup> A similar result can be reached in America even under an assignment rule. Section 61 of the Negotiable Instruments Law protects the timely payee against the bank's insolvency by giving him recourse against the drawer. Though the check be turned into an assignment, retention of Section 61 would qualify the assignment and save the check one of its essential earmarks of negotiability.

### *Stopping Payment*

In the United States, the drawer's right to stop payment is well established.<sup>63</sup> A check is not an assignment, but simply an order to the bank to pay funds to the holder. As such it creates an agency relationship between the drawer and the bank, revocable by the drawer at will.<sup>64-65</sup> This rule, by permitting the drawer to stop a check when he has been defrauded on the underlying transaction, has probably been instrumental in preventing many frauds. But the rule goes much farther and permits a drawer to stop payment capriciously. And while the holder of a stopped check has recourse against the drawer,<sup>66</sup> during the delay necessary to enforce his claim he runs all the risks of a general creditor.<sup>67</sup>

The French Uniform Check Law goes to the other extreme. Strictly interpreted, it limits the drawer's right to stop payment to two situations: loss of

62. See note 19 *supra*.

63. The right to countermand is provided for only indirectly by Section 114 of the NEGOTIABLE INSTRUMENTS LAW, which specifies that notice of dishonor need not be given to the drawer who has countermanded payment. But the practice has long been sanctioned by judicial decision. *Florence Mining Co. v. Brown*, 124 U.S. 385 (1888); *Tremont Trust Co. v. Burack*, 235 Mass. 398, 126 N.E. 782 (1920); *Steiner v. Germantown Trust Co.*, 104 Pa. Super. 38, 158 Atl. 180 (1931). Cases are collected in 5A MICHIE, BANKS AND BANKING § 193 (1950); 1 MORSE, BANKS AND BANKING §§ 398-9 (6th ed. 1928). See, generally, Moore, Sussman & Brand, *Legal and Institutional Methods Applied to Orders to Stop Payment of Checks*, 42 YALE L.J. 817 (1933); Zollman, *Stopping Checks*, 15 MARQ. L. REV. 197 (1931).

Any act of the drawer which conveys to the drawee bank before payment or certification definite instructions to stop payment and identifies the check properly, is sufficient. No prescribed language is required, and the direction may be given by telegram, in writing, by telephone, or other verbal means. Zollman, *supra* at 199.

64-65. See 1 MORSE, BANKS AND BANKING §§ 397-9 (6th ed. 1928).

66. The drawer cannot avoid genuine liability to the holder after stopping payment. If the drawer has no defenses, he remains liable both on the check and on the underlying transaction. See *Schirm v. Wieman*, 103 Md. 541 (1906); *Brown v. Cow Creek Sheep Co.*, 21 Wyo. 1, 126 Pac. 886 (1912).

67. See *Usher v. Tucker*, 217 Mass. 441, 443, 105 N.E. 360, 361 (1914): "[H]ence the effect [of stopping payment] so far as respects the drawer is to change his conditional liability to one free from the condition, and his situation is like that of the maker of a promissory note."

the check and insolvency of the holder.<sup>68</sup> The statute does not give the drawer the right to stop payment on the ground of fraud or failure of consideration.<sup>69</sup>

A better solution than either the American or the French would protect the holder from the consequences of an improper countermand, and at the same time allow the drawer to raise fraud or failure of consideration. Even under an assignment rule the drawer should be allowed to assert any valid defense on the underlying transaction against anyone but a holder in due course by notifying the bank to stop payment. The bank would then be obliged to segregate the funds available to meet the check until the parties could be interpleaded or until the holder sues the drawer in a separate action to litigate the drawer's defense.<sup>70</sup>

#### PROTECTION OF CHECKHOLDERS: EQUITABLE ASSIGNMENT

American courts have not been oblivious to the inequities of the non-assignment rule. Though governed by Section 189 of the Negotiable Instruments Law, they have seized upon the doctrine of equitable assignment to honor the checkholder's expectation where a so-called "assignment-in-fact" could be found.

Section 189 establishes only a presumption that a check is not an assignment, rebuttable by extrinsic evidence of the drawer's intent to assign his account or any part of it to the payee.<sup>71</sup> In *Fourth Street Bank v. Yardley*<sup>72</sup> the Supreme Court protected a payee against his drawer's insolvency where the payee had advanced money to the drawer bank to enable it to meet its clearing house obligations on the assurance that the drawer had enough on deposit with

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68. French Uniform Check Law, art. 32. Penal sanctions attach against a drawer who in bad faith withdraws funds necessary to meet a check or raises an invalid defense to payment. *Id.*, art. 66, as amended by Law of May 24, 1938, [1938] *Dalloz Périodique* IV. 257. See also 2 ESCARRA, *MANUEL DE DROIT COMMERCIAL* 747 (1948).

69. It has been suggested, however, that the defenses of failure of consideration, fraud, and illegal consideration may be raised before payment against a payee or holder with notice by virtue of statutory provisions outside the Uniform Check Law. See VALÉRY, *DES CHÈQUES EN DROIT FRANÇAIS* 145 *et seq.* (1937); 4 LYON-CAEN & RENAULT, *TRAITÉ DE DROIT COMMERCIAL* 527-8 (5th ed. 1925). For a contrary view, see LACOUR, *PRÉCIS DE DROIT COMMERCIAL* 370-1 (8th ed. 1945). The difference of opinion among French authorities is summarized in BOUTERON, *LE CHÈQUE* 285 *et seq.* (1924). Bouteron states that on this point the case law is as divided as the treatise writers.

70. For other methods of protection of the bank, see text at note 94 *infra*.

71. Originally, there was some doubt whether extrinsic evidence of an assignment-in-fact could be introduced to modify the non-assignment rule. See *Holbrook v. Payne*, 151 Mass. 383, 385, 24 N.E. 210 (1890). The language of Section 189 of the Negotiable Instruments Law, however, that a check "of itself" does not operate as an assignment, indicates that parol evidence is admissible to rebut the presumption. *Dunlap v. Commercial Nat. Bank of L.A.*, 50 Cal. App. 476, 195 Pac. 688 (1921); *Leary v. Citizens' & Manufacturers' Nat. Bank*, 123 Conn. 475, 23 A.2d 863 (1942).

72. 165 U.S. 634 (1897).

its New York correspondent to cover the check. In finding an equitable assignment the Court declared that the intent to create it need not be expressed in formal terms: it may be inferred from language used in and outside the instrument and circumstances surrounding the underlying transaction.

In line with the *Yardley* case,<sup>73</sup> courts have adopted the doctrine of equitable assignment to protect payees against the drawer's garnishing creditors,<sup>74</sup> the drawer's death<sup>75</sup> or insolvency,<sup>76</sup> and unwarranted stop orders.<sup>77</sup> In doing so they have earmarked special situations calling for a conclusive presumption of intent to create an assignment. Where a check is drawn for the exact amount in the drawer's account,<sup>78</sup> or where a special deposit is made to pay a particular check,<sup>79</sup> for example, the finding of equitable assignment is almost a certainty.<sup>80</sup>

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73. The force of *Yardley* was weakened somewhat by *Equitable Trust Company of New York v. First National Bank of Trinidad*, 275 U.S. 359 (1927). See *Turner, Equitable Assignment of Bank Deposits*, 37 YALE L.J. 626, 630-2 (1927). The doctrine of equitable assignment has nonetheless gained a strong foothold in the states. See notes 74-80 *infra*.

74. *Carlson v. Stafford*, 166 Minn. 481, 208 N.W. 413 (1926); *Slaughter v. First National Bank of Lamesa*, 18 S.W.2d 754 (Tex. Civ. App. 1929); *Hatley v. West Texas National Bank*, 284 S.W. 540 (Tex. Com. App. 1926). See also *McClain & Norvet v. Torkelson*, 187 Iowa 202, 174 N.W. 42 (1919); but see *Leach v. Mechanics Savings Bank*, 202 Iowa 899, 211 N.W. 506 (1926).

75. *Dunlap v. Commercial Nat. Bk. of L.A.*, 50 Cal. App. 476, 195 Pac. 688 (1920); *Aubrey v. O'Byrne*, 188 Ill. App. 601 (1914); *Webb v. O'Geary*, 145 Va. 356, 133 S.E. 568 (1926).

76. *Early & Daniel Co. v. Pearson*, 36 F.2d 732 (5th Cir. 1929); *Houck v. Bank of Newport*, 150 Ore., 295, 43 P.2d 179 (1935); *Austin v. Public National Bank*, 2 S.W. 2d 463 (Tex. Civ. App. 1928); *Central Trust Co. v. Bank of Mullens*, 108 W.Va. 12, 150 S.E. 137 (1929).

77. *Kilgore National Bank v. Moore Bros. Lumber Co.*, 74 S.W.2d 141 (Tex. Civ. App. 1934); *Green v. Brown*, 22 S.W.2d 701 (Tex. Civ. App. 1929).

78. *McEwen v. Sterling State Bank*, 222 Mo. App. 660, 5 S.W.2d 702 (1928); *In re Eshenbaugh's Estate*, 114 Pa. Super. 341, 174 Atl. 809 (1934). The same result has been reached even in the case of a gift check. *Varley v. Sims*, 100 Minn. 331, 111 N.W. 269 (1907).

79. *Manget v. National City Bank of Rome*, 168 Ga. 876, 149 S.E. 213 (1929); *Boyle v. Vivian State Bank*, 55 S.D. 441, 226 N.W. 579 (1929).

80. Even when invoked by a court, equitable assignment is no infallible method of protecting the checkholder. For example, the bank may refuse to pay on the ground of an alleged set-off arising out of a prior transaction between it and the drawer. See *Comment*, 46 YALE L.J. 483, 487-8 (1937). In that event, a finding of equitable assignment would probably not help the holder, since the obligor of an assigned claim who has a set-off against the assignor can assert it against the assignee even if it arose out of a collateral transaction, at least where the set-off existed as a matured claim at the time of the assignment. 4 CORBIN, CONTRACTS § 897 (1951).

In an effort to protect the checkholder in this and other situations, courts have invoked at least two theories in addition to equitable assignment:

(1) § 137 of the Negotiable Instruments Law. This section provides that where a drawer to whom a bill of exchange is delivered for acceptance destroys it or refuses to return it, he will be deemed to have accepted the bill. The applicability of this section

## CONCLUSION

The operation of an assignment rule effected by amendment of Section 189 can best be illustrated by five typical situations. On June 1, the drawer A buys goods from B and in return gives B a check drawn on bank C. Before B presents the check or in any way notifies C that the check is outstanding, one of the following things happens:

1. A withdraws all his funds from bank C.
2. A goes bankrupt. His trustee in bankruptcy immediately withdraws A's funds from bank C.
3. A dies. The executor of his estate immediately draws all A's funds from bank C.
4. A creditor of A garnishes A's funds in bank C, then obtains a judgment against A and collects all A's funds from bank C to satisfy the judgment.
5. A draws a second check on bank C payable to D. D cashes this check at bank C. After payment of the check, there are insufficient funds remaining in A's account to pay B.

After one of these things has happened, B presents his check to bank C and demands payment.

In each of these situations, the bank is protected. Since it had no notice of A's outstanding check to B, it could with impunity, even under an assignment rule, pay out A's funds to A himself, to those claiming through A

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to checks was tested in the early case of *Wisner v. First National Bank*, 220 Pa. 21, 68 Atl. 955 (1908). The drawee bank had failed to return within twenty-four hours after receipt several checks received by mail from a collecting bank. The Pennsylvania Supreme Court held, first, that Section 137 applies to checks presented for payment, and, second, that mere retention constitutes a "refusal to return" within the meaning of that section. The drawee bank was therefore deemed to have accepted the checks. The *Wisner* rule has since been adopted in a number of states. See 1 PATON, *DIGEST OF LEGAL OPINIONS* 14-17 (1940); BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 137 (Beutel ed. 1948); BRITTON, *BILLS AND NOTES* 831 n.2 (1943); Notes, 63 A.L.R. 1138, 1140 (1929), 68 A.L.R. 862 (1930). Cf. Penn. Laws 1909, Act 169, overruling *Wisner* in the state of its birth.

(2) Third party beneficiary. Particularly in the midwest, in order to protect farmers and cattlemen, courts have given check-holders an action against the bank as third party beneficiaries of the contract between the bank and its dealer depositors. *Goeken v. Bank*, 100 Kan. 177, 163 Pac. 636 (1917); *Ballard v. Home National Bank*, 91 Kan. 91, 136 Pac. 935 (1913); See Comment, 46 YALE L.J. 483, 484 (1937). Except in limited circumstances, no set-off is available against a third party beneficiary. *RESTATEMENT, CONTRACTS* § 140 (1932).

For a legislative approach to the same desire to protect stockholders, see Model Deferred Posting Statute, treated in Note, 59 YALE L.J. 961 (1950). The statute was drafted by the American Bankers Association, with the cooperation of Federal Reserve lawyers, and circulated for adoption by the states. *Id.* at 964, n. 14.



(situations 2, 3 and 4 above), or to D.<sup>81</sup> B may not be remediless, however; here the assignment rule would make a difference. In situation 2, for example, B, as an assignee, would be entitled to priority to the extent of the amount of his check on the funds withdrawn by A's trustee from bank C.<sup>82</sup> Unless a preference or a fraudulent conveyance could be shown, B could collect from the trustee the full amount of the check in a reclamation proceeding on the theory that the trustee held the funds collected from bank C in constructive trust for B as assignee.<sup>83</sup> And under the 1950 amendment to Section 60a of the Bankruptcy Act, no preference could be shown merely because the assignment might not be good in some states against subsequent assignees.<sup>84</sup>

Similar results would be reached in situations 1, 3 and 4. Without an assignment rule, possession of the check puts B in no better a position than other creditors.<sup>85</sup> Under an assignment rule, B would have a prior claim against the funds withdrawn from bank C, at least insofar as they could be traced.<sup>86</sup> In each of the respective situations, A, his executor, or his creditor would hold the funds for the benefit of B, subject to the defenses against him arising from the original transaction.

In situation 5, on the other hand, different results would be reached depending on the jurisdiction. Under the so-called New York rule, for example, B could collect back from D, who would hold the funds as a subsequent assignee subject to B's prior rights.<sup>87</sup> The lack of notice would be irrelevant. In jurisdictions following the English rule, on the contrary, notice would be

81. See 4 CORBIN, *op. cit. supra* note 80, § 894.

82. *Id.*, § 903. The trustee in bankruptcy would of course stand in no better a position than any subsequent attacking creditor. Cf. *Corn Exchange Nat. Bank v. Klauder*, 318 U.S. 434 (1943), where the trustee prevailed over the assignee by showing a preference. See 4 CORBIN, *supra*, § 903 n.74.

83. It would probably be necessary to trace the funds in some fashion. See *Cunningham v. Brown*, 265 U.S. 1 (1924); 6 COLLIER, *BANKRUPTCY* 1202-4 (14th Ed. 1950).

84. In the *Klauder* case, *supra* note 82, a preference was found because the assignment had not been perfected against the hypothetical subsequent assignee set up in the then § 60a of the Chandler Act, 52 STAT. 869 (1938), 11 U.S.C. § 96 (1946). For discussion, see Countryman, *The Secured Transactions Article and Section 60*, 16 L. & CONTEMP. PROB. 76, 79-81 (1951). The 1950 amendment, which requires perfection against any "subsequent lien . . . obtainable by legal or equitable proceedings" rather than against a bona fide purchaser, was specifically designed to overrule *Klauder*. 64 STAT. 22 (1950), 11 U.S.C.A. § 96 (Supp. 1950). See MacLachlan, *Preference Redefined*, 63 HARV. L. REV. 1390 (1950). The notice-filing and validation statutes adopted in several states for the same purpose are directed at accounts receivable assignments, and presumably would not apply to assignment by check. See, e.g., OHIO GEN. CODE ANN. §§ 8509-3 to 8509-6 (Supp. 1949) (notice-filing); CONN. GEN. STAT. §§ 6718-26 (1949) (validation); Countryman *supra*, at 81, n.28-32.

85. See text at note 7 *supra*, *et seq.*

86. See note 83 *supra*.

87. Cf. *Fortunato v. Patten*, 147 N.Y. 277, 41 N.E. 572 (1895); *Superior Brassiere Co. v. Zimetbaum*, 214 App. Div. 525, 208 N.Y. Supp. 944 (1st Dep't 1925). For discussion of the New York, Massachusetts, and English rules, see Countryman, *supra* note 84, at 79.

essential to B's claim, and payment to D would be final.<sup>88</sup> Similarly, D would be protected in Massachusetts (four-horsemen) rule states, since B would not have fulfilled any of the four elements of the rule—payment, novation, judgment on the assignment, or possession of essential documentary evidence of it.<sup>89</sup> In order to make payment final in New York rule states,<sup>90</sup> if an assignment rule were adopted, Section 189 should be additionally amended to adopt the payment part of the Massachusetts rule and protect the first checkholder to collect from the bank.

The principal objection by banks to the working of an assignment rule of this type would be to the possibility of notice. It was assumed in the situations outlined above that the bank had no notice of the outstanding check. The bank was therefore protected in paying any of the persons hypothesized. But B may attempt to avoid the inconvenience of being forced to go against the person paid by the bank. He may seek to prevent the bank from paying out the funds by notifying it of his outstanding check—either by telephone or by mail. If the bank, with notice of the outstanding check, paid out A's funds to A, to a person claiming through A, or to D, it would still, under normal assignment law, be liable to B.<sup>91</sup>

In order to avoid the burden this would place on them, banks could simply contract with their depositors to incur no liability on any check assignment until notified of it through presentment. As an assignee, any holder of a check would be bound by the terms of the contract between the debtor bank and the drawer-assignor.<sup>92</sup> The bank would then be in as safe a position as under the non-assignment rule. It would have opportunity to check the drawer's balance before incurring liability on a check. And if it ascertained upon presentment that a stop order was in effect on a particular check, it would be

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88. See *Dearle v. Hall*, 3 Russ. 1, 38 Eng. Rep. 375 (Ch. 1828).

89. This rule was adopted by RESTATEMENT, CONTRACTS § 173 (1932). The last requirement—documentary evidence or "tangible token"—apparently refers to a unique document, such as a bank book or a bond certificate, not simply a written assignment of the sort a check would be.

90. See generally Note, *Deferred Posting under the Proposed Commercial Code*, 59 YALE L. J. 961 (1950).

91. See 4 CORBIN, *op. cit. supra* note 80, § 894.

92. Any debtor may specify that his debt is not assignable at all. See, e.g., RESTATEMENT, CONTRACTS § 151 (1932); 4 CORBIN, *op. cit. supra* note 80, § 873. The lesser step of limiting the conditions on which the debt may be assigned follows from this power to prohibit all assignments.

This solution would incidentally also take care of the troublesome case where a payee gets a nonconforming acceptance from a bank (see N.I.L. §§ 132, 134, 135 and 187 for the requirements of a binding acceptance), and then sues the bank for the face amount of the check after the drawer has withdrawn all his funds. The bank is now immune under the non-assignment rule. *E.g.*, *Rambo v. First State Bank of Argentina*, 88 Kan. 257, 128 Pac. 182 (1912). It would still be immune under an assignment rule so long as the drawer withdrew the funds before the payee presented the check. The rule would operate much as the proposed rule for competing checkholders, discussed at notes 87-90 *supra*.

able to take immediate action to protect itself. Even though technically liable to the holder, it could avoid fighting the drawer's battles<sup>93</sup> either by interpleader, or by giving notice to the drawer so as to estop him from later contesting the right of the bank to pay out on any judgment in favor of the holder.<sup>94</sup> Alternatively, as suggested above, it could escape litigation completely by contracting with the depositor for segregation of funds sufficient to cover the amount affected by the stop order.<sup>95</sup>

An assignment rule would thus operate more equitably than the non-assignment rule presently does, and do so without impairing the commercial utility of payment by check. Protection of banking practices and a more realistic equation of legal effect to business expectation could go hand in hand.

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93. See, e.g. Zane, *Death of the Drawer of a Check*, 17 HARV. L. REV. 104 (1904).

94. See *Minneapolis Nat. Bank v. Holyoke Nat. Bank*, 182 Mass. 130, 65 N.E. 24 (1902). Cf. *Konitzky v. Meyer*, 49 N.Y. 571 (1872). One authority has advocated avoiding all stop order problems by abolishing stop orders completely. 3 PATON, *DIGEST OF LEGAL OPINIONS* 3469 (1940).

95. See text at note 70 *supra*.